THE JUVENILE COURT MOVEMENT FROM A LAWYER'S STANDPOINT

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The lawyer is apt to look at the juvenile court movement simply as it is expressed in the statutes passed by many of the state legislatures and commonly referred to as "juvenile court laws." He sees a somewhat heterogeneous mass of legislation which has no apparent correlation with the general legal system. Aside from questions as to the constitutionality of such statutes he will look in vain for reported cases arising under them and will probably dismiss the subject as one of the fields which the general legal system has failed to cover. Yet the cases which arise and are disposed of under these statutes frequently involve fundamental legal principles, for questions of status are the most fundamental of all legal questions and just here lies the especial interest of the juvenile court movement to the legal student. By questions of status is meant those questions which pertain to the relations of individuals to each other and to social and political groups, such as the family, the state and society in general. All rights and obligations pertain to persons either by reason of the person's relation to some group—from the mere fact of his standing in that relation—or because of some contract or agreement between himself and some other person or group. Questions touching the criminal law also arise. The statutes themselves and the movement which caused their enactment show little conscious consideration of the legal principles involved. They are, of course, the expression of certain theories for social betterment rather than of social experience or practice. These theories relate largely to the class of questions touching the criminal law. In defending these statutes and maintaining their constitutionality the object of the statutes is usually stated to be to prevent juveniles continuing in a career of crime or becoming criminals by reforming them and furnishing proper training for them. This seems to be the dominant note and the original one. In Pennsylvania the act of 1901 is generally referred to as the first juvenile court act. But

in 1893 an act was passed providing that no child under sixteen years of age under restraint or conviction should be placed in any apartment or cell of any prison or place of confinement or in any court room during the trial of adults charged with or convicted of crime, and that all cases involving the trial and commitment of children for any crime or misdemeanor in any court may be heard and determined by such court at suitable times to be designated therefor by it separate and apart from the trial of other criminal cases of which sessions a separate docket and record shall be kept. This class of ideas seems to have been an extension of the ideas of treatment of criminals developed by the philanthropists with the object of reformation largely in view, and based partly on determinist theories denying free-will and responsibility for crime and partly on directly opposite theories of the value of training in developing the will. When these views as to the treatment of criminals became common they were naturally applied to the treatment of juvenile delinquents. The extent to which questions of status are involved however, has been largely overlooked.

As before stated, there is no legal literature except on the question of whether constitutional provisions are infringed by the statutes. There is a considerable literature of the movement, propagandist in character, of the nature either of panegyric or of criticism and for the most part based not on actual observation and study but on preconceived theories. A careful and impartial study of the operation of these statutes is much to be desired but does not yet exist. Some general statements with regard to their operation are justified but cannot be made too confidently.

Most of the statutes referred to have been passed within the last fifteen years but, as has already been indicated, it would be a mistake to suppose that they originated spontaneously within this period; indeed there is much less that is entirely new about them than is generally supposed. What is new, I think, falls chiefly under two heads: (1) providing increased administrative machinery for the application by the courts of established principles and recognized powers, such as the suspension of sentence and probation, the results of which have been generally beneficial and (2) the entire disregard, as far as the statutes themselves go, of established legal principles and the absence from them of any limitations on the arbitrary powers of the court, which always involves dangerous possibilities. Con-

sideration of the whole movement shows that the juvenile court as we now have it is the result of the operation of two opposing tendencies, one of which may be called the socialistic tendency, manifested in the various statutes, the other the individualistic tendency, manifested in the attitude of the courts toward these statutes, frequently declaring them unconstitutional, but now modified by the vigorous support of the statutes. Considerations of space prevent a comprehensive survey of the ground to show the basis of this conclusion; a few points and instances only can be briefly indicated.

In 1867, the Illinois legislature in "an act in reference to the Reform School of the city of Chicago" provided that in the case of any child under sixteen "destitute of proper parental care" or "growing up in mendicancy, ignorance, idleness or vice," any judge of the superior or circuit courts if of opinion that "his or her moral welfare and the good of society require" should commit such child to the Reform School. This act was declared unconstitutional by the supreme court of Illinois in 1871 in the case of People *vs.* Turner. In the opinion Judge Thornton considered the act repugnant to parental rights but based the decision on the constitutional right of a minor as well as an adult to liberty, except as punishment for crime. He said:

> It is claimed that the law is administered for the moral welfare and intellectual improvement of the minor and the good of society. . . . . If, without crime, without the conviction of any offense, the children of the state are to be thus confined for the good of society, then society had better be reduced to its original elements and free government acknowledged a failure. In cases of writs of habeas corpus to bring up infants, there are other rights beside the rights of the father. If improperly or illegally restrained, it is our duty *ex debito justitiae* to liberate. The welfare and rights of the child are also to be considered. The disability of minors does not make slaves or criminals of them. They are entitled to legal rights and are under legal disabilities. . . . . Can we hold children responsible for crime; liable for their torts; impose onerous burdens upon them and yet deprive them of the enjoyment of liberty without charge or conviction of crime? The bill of rights declares that all men are by nature free and independent and have certain inherent and inalienable rights, among which are life, liberty and the pursuit of happiness. . . . . Shall we say to the children of the state, you shall not enjoy this right, a right independent of all human laws and regulations? It is declared in the constitution, is higher than constitution and law, and should be held forever sacred.

The Turner case is typical of many others during the next thirty years. The various legislatures passed numerous acts in which can be traced the fuller development of the socialistic idea that the abstract political entity we call the state is a sort of artificial parent of all minors with rights over them superior to any rights of the natural parents or of the minors themselves; that it is the duty of the state to control and supervise the education both mental and moral of all children and for such purpose may dispose of their custody, fix their status and confine them in an institution provided only the primary purpose be not punishment for something done but reformation or improvement.

This legislative tendency was long resisted by the courts from the standpoint of the rights of the minor himself. The tendency of the courts was individualistic and to support the right of the minor to his liberty as against the state except after conviction of crime, subject only to the rights of parents. In all questions as to the custody of children the courts adopted as a basic principle the good of the child and treated the minor as the subject of rights and duties and only under certain disabilities. The attempt has been made to cite this chancery jurisdiction at common law as a ground for sustaining the statutes under discussion. For example, in an address before the American Bar Association in 1909 on the juvenile court, Judge Julian W. Mack cited some early cases of the chancery protection of infants as affording the legal ground for sustaining the juvenile court jurisdiction. This theory, however, is entirely erroneous. Very different notions are involved. The chancery jurisdiction was always exercised for the protection of the individual rights of infants in respect to their persons or their property and not as asserting against either the paramount authority of the state. It originated in the feudal relation of lord and vassal and was first exercised principally to secure to the king his feudal dues. The extension of it in this country was purely individualistic and to supply the want of natural guardianship and to vindicate the rights of the minor as against the state as well as individuals. It appears, however, that this erroneous theory has had considerable influence over courts in sustaining statutes framed on entirely different and opposing theories.

In Pennsylvania the act of 1893, before referred to, was held unconstitutional in one of the counties and the decision was acqui-

esced in. In 1901 a complete juvenile court act was passed. This act was held unconstitutional by the superior court in Mansfield's Case, 22 Sup. 224, on the grounds that it created a new court, was insufficient in title and offended against the constitutional provisions that no person shall for any indictable offense be proceeded against criminally by information and that trial by jury shall be as heretofore. Another act was passed in 1903 which avoided the objections as to creation of a new court and as to title but in other respects was more flagrantly in conflict with constitutional provisions than was the act of 1901. Nevertheless in the case of Comw. *vs.* Fisher, 27 Sup. 175, the superior court (two judges dissenting) held that the act of 1903 "offends against none of the provisions of the constitution." This decision was affirmed on appeal to the supreme court, 213 Pa. 48, the court saying:

> To save a child from becoming a criminal, or from continuing in a career of crime, to end in maturer years in public punishment and disgrace, the legislature may surely provide for the salvation of such a child, if its parents or guardian be unable or unwilling to do so, by bringing it into one of the courts of the state without any process at all, for the purpose of subjecting it to the state's guardianship and protection. . . . . There was no trial for any crime here and the act is operative only when there is to be no trial, the legislature denies the child no right of a trial by jury for the simple reason that, by the act, it is not to be tried for anything. The design is not punishment nor the restraint imprisonment.

But this is merely begging the question. According to this decision the constitutional guaranty against deprivation of life, liberty or property without due process of law is limited to persons actually brought to trial for crime. It is impossible to escape the impression that the public opinion favoring this legislation had infected the court and that in the opinion it is endeavoring to find a legal ground for sustaining the act, but without conspicuous success. The supreme court of Illinois in 1905, in People *vs.* McLain, with reference to the Illinois juvenile court act, said:

> If this enactment is effective and capable of being enforced as against the relator, father of the boy, it must be upon the theory that it is within the power of the state to seize any child under the age of sixteen years who has committed a misdemeanor, though the father may have always provided a comfortable, quiet, orderly and moral home for him, and have supplied him with school facilities, had not neglected his moral training, and had been and was still ready to render him all the duties of a parent.

It would seem that constitutional safeguards as far as minors and the relation of parent and child is concerned have completely broken down. Many of the provisions of the juvenile court acts are clearly in conflict with constitutional provisions and this conclusion can only be escaped by evasions. In the case of commitment to an institution there is often a very real deprivation of liberty nor is that fact changed by refusing to call it punishment or because the good of the child is stated to be the object. The only logical theory for their complete justification is the extreme socialistic theory of the functions of the state. But this is only a verbal justification at most for in spite of sonorous language as to saving the child and affording it protection, care and training by the state, there has been scant provision for making good any of these so far as the state is concerned. What usually happens is that the child is handed over to some organization or institution (sometimes partly subsidized with state money, it is true) which in some cases does its work well and in others badly.

Perhaps it may be premature to regard the constitutional questions as settled. No doubt the courts have been right in refusing to declare these acts unconstitutional in their entirety and not all the features are discussed in the decisions. The questions presented in most of the cases have been predicated upon parental rights and these have been presented as though they were purely private rights. It is strange that the public nature of the rights involved has been so little recognized. It is also true that in the majority of cases involved the parties are unable through poverty or ignorance or both to make a contest. The statutes are of course general in terms. In the McLain Case, *supra*, it was argued: "This law applies, with equal force, to the son of the pauper and the millionaire, to the minister's son (who is sometimes the wolf among the flock), as well as to the son of the convict and the criminal." As a matter of fact, however, it is not applied to the dominant social class and if ever it is so applied it will undoubtedly be largely modified. It may be that a period of criticism will succeed the period of encomium as to these statutes and that then the features really out of harmony with our existing legal system will be eliminated. There are some indications of the development of a critical attitude. In commenting on the Monroe County (N. Y.) juvenile court act Mr. T. D. Hurley, of Chicago, who was identified with the early juvenile

court legislation in Illinois, in an article widely copied in the public press, says:

> Throughout the law the state is made supreme master over the child. The parent is only incidentally considered; he is not made a party to the proceedings, nor is he charged with neglect or inability to care for his child. The state is made to occupy the position of primary parent with rights superior to that of the natural parent. This is a false and vicious position to take. There is no law or authority to substantiate this doctrine. The rights of the parent are superior to those of the state, and, until the parent forfeits these rights the state cannot interfere with his control or custody of the child. Parental rights should not only be protected, but, as far as practicable, preserved.

Archbishop Glennon, of St. Louis, has been quoted as follows:

> We have the right to preserve our homes from state control. We have the right to remain free and not to become tenants of a soulless state. We utterly abhor the doctrine that the little children who bless our homes shall be wards of the state, common property. The idea of common parentage is not only the end of order, but the end of civilization itself.

It would not be difficult to eliminate the features of these statutes which conflict with constitutional provisions and general legal theory and still retain all the valuable features so that they might fit into our legal system and not be, as they are now, extra-legal expedients. The system of probation and the whole administrative system provided for enabling a court to exercise supervision over the delinquent juvenile are generally appreciated as valuable and will be still further improved. The vague and unlimited nature of the powers granted to the court would seem to call for some further definition and specification. It is to be presumed, of course, that the court will act in accordance with legal principles. It has, however, been proposed to constitute laymen and women juvenile court judges. This has been opposed on the ground that legal training is essential for a judge in the juvenile court as well as in any other. In regard to such a proposal the supreme court of Utah said in Mill *vs.* Brown:

> The judge of any court, and especially a judge of a juvenile court, should be willing at all times, not only to respect, but to maintain and preserve the legal and natural rights of men and children alike. . . . . The juvenile court law is of such vast importance to the state and society that it seems to us it should be administered by those who are learned in the law and versed

in the rules of procedure, to the end that the beneficent purposes of the law may be made effective and individual rights respected.

But everything should not rest with the personality of the judge. While with the right man in the right place the very indefiniteness of his powers may be productive of immediate good, in the long run it will be just as unsafe as experience proved it to be in the criminal law. The corporal punishments and other abuses that have developed in some of our juvenile courts are sufficient indications of possibilities. The desired result might, of course, be reached through the decisions of the courts themselves. For reasons partly indicated above, however, few cases come before the appellate courts and if juvenile court judges formulate their decisions in writing these do not find their way into the reports. It is not impossible that judicial decisions may become more prominent in connection with this class of cases, but some modification of the acts themselves would seem desirable.

There is too a confusion of functions in these statutes. The view is gaining general recognition that the juvenile court should not have jurisdiction in the cases of dependent children. Where the case is one only of relief because of poverty or misfortune there is no question for a court, and such cases can be far better dealt with by the administrative agency of the poor directors or similar officials and agencies. But beside the question of dependency there are the distinct fields of crime and status embraced in most juvenile court acts. The child who comes into court accused of crime inevitably stands on a different footing from one who is there merely from parental neglect or from incorrigibility—and should. All criminal questions should be dealt with by a criminal court. Every child accused of crime should be tried and be subject to neither punishment nor restraint of liberty unless convicted. No child should be restrained simply because he has been accused of crime, whether he is guilty or not. Of course if there is no denial of the charge there is no necessity for a trial; but there can be no objection to having the criminal charge tried in the criminal court. There need be no punishment. If convicted he can then be turned over to the juvenile court to determine in a proper proceeding, with the rights of all parties safeguarded, whether a change in his custody or status would be for his best interest. We should then have the juvenile court dealing only with questions of status, with questions of the

custody and the control of the child. It may be that criminal trials of juveniles should be held at special sessions, but the separation of the consideration of the fixing of the status of the child from the consideration of his guilt or innocence of a criminal offense would be advantageous. There seems to be a tendency to bring all questions of family status into one group before one court, the so-called courts of "domestic relations." Theoretically there is much to recommend this scheme but its value remains to be demonstrated in practice.